

Office of the State Appellate Defender  
**Illinois Criminal Law Digest**

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## APPEAL

### §2-6(a)

**People v. Denson**, 2014 IL 116231 (No. 116231, 11/20/14)

1. In criminal cases, an issue is preserved for review if it is raised in either a motion *in limine* or a contemporaneous trial objection and is included in the post-trial motion. Where the State filed a motion *in limine* to admit co-conspirator statements as an exception to the hearsay rule, defendant filed a response, and the trial court granted the motion *in limine* after a full hearing, the issue was preserved although defendant did not file his own motion *in limine*. The court stressed that the forfeiture rule is intended to encourage defendants to raise issues in the trial court, ensure that the trial court has an opportunity to correct any errors before the case is appealed, and prevent defendant from obtaining a reversal through his or her own inaction. In light of these purposes, the critical consideration is not which party initiated the motion *in limine*, but whether the issue was in fact litigated in the trial court:

Under these circumstances, requiring defendant to recaption and refile his response to the State's motion as a motion *in limine* of his own would accomplish precisely nothing, other than to clutter the record with duplicative pleadings. Because the trial court was given a full and fair opportunity to rule upon the issue through the State's motion *in limine* and the defendant's response, the issue was preserved when defendant placed it in his post-trial motion, without any need to file his own motion *in limine*.

2. Furthermore, where statements were admitted after the State's motion *in limine* was granted, defendant was not required to offer a contemporaneous objection when the evidence was presented at trial. Instead, defendant preserved the issue by filing a response to the motion *in limine* and placing the issue in the post-trial motion.

The court acknowledged that in civil cases, a contemporaneous trial objection is required to preserve an issue that has been litigated in a motion *in limine*. In criminal cases, by contrast, the issue must be included in the post-trial motion but need not be the subject of a contemporaneous objection at trial. The court explained the difference in procedure by noting that a post-trial motion is required in all criminal cases but may or may not be required in civil cases.

The court also criticized the State for taking inconsistent positions in the trial court and on appeal. In the lower court, the State indicated that its purpose in filing the motion *in limine* was to avoid having the defense raise an objection at trial that would require the trial to be interrupted. "Given this, we have some difficulty now entertaining the State's argument that defendant forfeited review of the contested statements by failing to make a contemporaneous trial objection, when insulating those statements from a contemporaneous trial objection was the State's express

objective. . . .” The court added, “[W]e in no way can condone the State’s maneuvering in this case, and we strongly discourage the State from proceeding this way in the future.”

(Defendant was represented by Assistant Defender Chris McCoy, Elgin.)

## §2-6(a)

**People v. Guillen**, 2014 IL App (2d) 131216 (No. 2-13-1216, 11/25/14)

The State appealed the trial court’s dismissal of charges against defendant based on double jeopardy. Defendant’s appellate attorney was allowed to withdraw because he had not been retained for appeal and defendant filed no appellate brief responding to the State’s arguments. The Appellate Court agreed that it could nonetheless consider the merits of the appeal, but split three ways on the rationale for doing so with no controlling opinion.

In **First Capitol Mortgage Corp. v. Talandis Construction Corp.**, 63 Ill. 2d 128 (1976), the Supreme Court set out three options available to the reviewing court when an appellee does not file a brief: (1) the court may, if justice requires, serve as an advocate for the appellee and search the record for reasons to affirm the judgment being appealed; (2) the court may decide the case on the merits if the record is simple and the issues easily decided even without an appellee’s brief; or (3) the court may reverse the judgment below if the appellant’s brief demonstrates *prima facie* reversible error and the record supports the appellant’s contentions.

1. Justice Schostok delivered the judgment of the court reversing the trial court, and writing for herself alone selected the second **Talandis** option. She contended that the record was simple since there were no disputed factual issues and, although she admitted that principled persons may disagree with her decision (as shown by the dissenting opinion), the legal issue was simple enough for the court to decide the case without the aid of an appellee’s brief. Accordingly, Justice Schostok determined based on the appellant’s brief alone that the trial court had improperly dismissed the charges on double jeopardy grounds.

2. Justice Zenoff agreed with the judgment reversing the trial court, but disagreed with Justice Schostok’s use of the second **Talandis** option. Although the record was simple, the double jeopardy issue was not easily decided, as shown by the dissenting opinion, the length and complexity of Justice Schostok’s analysis, and the fact that this was an issue of first impression in Illinois.

Justice Zenoff also disagreed with Justice Hudson, who in dissent selected the first option from **Talandis**. That option is available only if justice so requires, which was not true here. The court allowed defendant’s private counsel to withdraw and

defendant did not retain new counsel or appear *pro se*. Justice thus did not compel the court to advocate on defendant's behalf.

Instead, Justice Zenoff selected the third **Talandis** option. That option allows the court to reverse the trial court if the appellant's brief shows *prima facie* reversible error supported by the record. *Prima facie* means "at first sight" or "on the face of it." Here, the State established what appeared to be error "at first sight," and thus Justice Zenoff would reverse on that basis.

3. Justice Hudson dissented from the judgment reversing the trial court. He agreed with Justice Zenoff that the issue was not simple and thus the second **Talandis** option should not apply. Instead, he selected the first option and acted as an advocate for defendant. He disagreed with Justice Zenoff's contention that the first option did not apply because defendant did not retain new counsel or appear *pro se*. Although this might show a lack of diligence, the record was unclear as to why defendant failed to do this, and it would be unfair to attribute dispositive weight to this single factor.

The more important factor was the nature of the right at issue and here there was a violation of a fundamental constitutional protection. Thus the court had an obligation to serve as an advocate for defendant and, having done so, Justice Hudson would have found that the trial court properly dismissed the charges on double jeopardy grounds.

#### **§2-6(b)**

**Cordrey v. Illinois Prisoner Review Board**, 2014 IL 117155 (No. 117155, 11/20/14)

Defendant filed a *mandamus* complaint alleging that due process and equal protection were violated because due to his indigency, he was denied release on MSR after he was unable to find a suitable place to live. The court concluded that the public interest exception to the mootness doctrine applied. Thus, the case was not moot although defendant had completed his MSR term by the time the appeal was decided.

The public interest exception to the mootness doctrine applies where: (1) a question is of a substantial public nature; (2) there is a need for an authoritative decision to provide future guidance; and (3) the situation is likely to recur. Because every convicted felon who is not serving a natural life term is subject to MSR, and because the practice of violating inmates who do not have an appropriate host site has been the subject of extensive litigation, the public interest exception was satisfied.

**§2-6(b)**

**People v. Holt**, 2014 IL 116989 (No. 116989, 11/20/14)

Defendant argued on appeal that trial counsel rendered ineffective assistance by failing to argue that she was fit to stand trial. Although defendant was found unfit in the trial court, by the time the case was on appeal she had been restored to fitness, making the issue moot. The Supreme Court nonetheless addressed the issue under the public interest exception to the mootness doctrine.

The public interest exception has three requirements: (1) the issue must be public rather than case-specific; (2) an authoritative decision is needed to guide public officers; and (3) the issue is likely to recur. This case presented the court with “the opportunity to begin building a body of law, where none exists” giving guidance to defense counsel regarding how best to represent a client’s interests when counsel believes the client is unfit but the client opposes that position. The court also found that this type of issue, or variants of it, would be likely to recur. The public interest exception was thus satisfied.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

**BURGLARY**

**§8-1(c)**

**People v. Bradford**, 2014 IL App (4th) 130288 (No. 4-13-0288, 11/24/14)

720 ILCS 5/19-1(a) provides that “a person commits burglary when without authority he or she knowingly enters or without authority remains in a building . . . or any part thereof, with intent to commit therein a felony or theft.” Thus, burglary may be committed by either: (1) entering a building without authority with the intent to commit a felony or theft, or (2) remaining in a building without authority with the intent to commit a felony or theft. Defendant was charged with the second type of burglary, for knowingly without authority remaining within Walmart with intent to commit a felony or theft.

The evidence showed that defendant entered Walmart during business hours, took two DVDs from a display near the entrance, and returned the DVDs at the customer service desk in exchange for a gift card. He then removed the price tag from a hat, which he placed on his head, and put a pair of shoes in a Walmart bag which he took from his coat. Defendant then went with an unknown male to a cash register, paid for the unknown male’s items using the gift card he had received earlier, and started to leave the store without paying for the shoes or hat.

Defendant argued that he was improperly convicted of burglary by remaining in the store with intent to commit a theft because he had entered the store lawfully, did not exceed the physical scope of that authority, committed the offense during business hours, and left after completing his criminal acts. Defendant argued that his actions constituted retail theft rather than burglary.

The Appellate Court disagreed. Under Illinois precedent, authority to enter a building which is open to the public for business extends only to those who enter with a purpose consistent with the reason the building is open. Thus, a person who enters with intent to commit a theft can be convicted of burglary based upon entering the business with that intent, because his intent is inconsistent with the purpose for which the owner has granted authority to the public to enter.

The court concluded that the same rationale applies where a defendant is convicted of burglary by remaining in a building that is open for business:

[J]ust as a defendant's *entry* is "without authority" if it is accompanied by a contemporaneous intent to steal, so too must a defendant's *remaining* be "without authority" if it also is accompanied by an intent to steal. . . . Accordingly, we . . . conclude that a defendant who develops an intent to steal after his entry into a public building may be found guilty of burglary by unlawfully remaining. . . . [T]he authority to remain in a public building, or any part of the public building, extends only to persons who remain in the building for a purpose consistent with the reason the building is open.

Because defendant remained in Walmart "without authority" as he moved through the store and stole merchandise, and his purpose for being in Walmart was not consistent with the purpose for which the store was open to the public, his authority for remaining in the store was implicitly withdrawn. The conviction for burglary was affirmed.

(Defendant was represented by Assistant Defender Joel Wesson, Springfield.)

## COLLATERAL REMEDIES

### §9-3(a)

**Cordrey v. Illinois Prisoner Review Board**, 2014 IL 117155 (No. 117155, 11/20/14)

1. *Mandamus* is an extraordinary remedy and is used to enforce the performance of official duties by a public officer where no exercise of discretion on the part of the



officer is involved. A writ of *mandamus* will be awarded only if a plaintiff establishes a clear right to relief, a clear duty by a public official to act, and clear authority in the public official to comply with the writ. In addition, there must be no other adequate remedy.

*Mandamus* is improper where the court's discretion or judgment will be substituted for that of the official. Only issues of law will be considered in original actions for *mandamus*. If factual questions are present, *mandamus* is an inappropriate remedy.

2. Here, *mandamus* was sought to prohibit the Department of Correction practice of placing sex offenders on MSR but immediately violating the inmate "at the door" of the prison for not having an adequate host site. The complaint alleged that due process and equal protection were violated because affluent inmates can generally find suitable housing, but indigent persons are unable to do so and therefore are required to serve their MSR terms in prison. Defendant sought *mandamus* to compel the Prisoner Review Board and the warden to release him to serve MSR at a suitable host site outside the prison.

The court concluded that the complaint was insufficient to establish a clear right to relief, a clear duty on the part of a public official to act, and clear authority on the part of the official to comply with the writ. Both the Prisoner Review Board and DOC have statutory authority with regard to MSR. The Prisoner Review Board has wide discretion in setting the conditions of MSR and determining whether revocation of MSR is warranted, while DOC maintains custody of inmates who are placed on MSR and provides supervision. The court noted that it is DOC, and not the Review Board, that is statutorily required to assist an inmate in finding a suitable host site.

Furthermore, DOC's obligation is to assist the inmate in finding a site; it has no obligation to actually find a suitable site. "Under these circumstances, defendant failed to establish that "respondents have the authority, let alone a duty," to release an inmate on MSR when no suitable host site has been found.

3. Even where the requirements for a writ of *mandamus* have not been met, the court may consider a *mandamus* petition which presents a novel issue that is of crucial importance to the administration of justice. However, the petition in this case did not present an issue concerning the constitutionality of denying MSR based upon indigency.

The court found that the record presented factual issues concerning whether indigent inmates are treated disparately from wealthy inmates concerning release on MSR, and that the limited record available indicated that defendant's inability to find a suitable host site was due to his status as a sex offender rather than because he was indigent.

The petition for writ of *mandamus* was denied.

## CONFESSIONS

### §10-4(d)

**People v. Flores**, 2014 IL App (1st) 121786 (No. 1-12-1786, 11/14/14)

1. To protect a defendant's constitutional right to silence, interrogation must cease once the defendant indicates in any manner and at any time prior to or during custodial interrogation that he wishes to remain silent. Once a defendant has asked to remain silent, his post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of his initial request.

2. Here the police failed to honor defendant's invocation of his right to remain silent. After giving defendant his **Miranda** rights, the police told defendant that a co-defendant had made statements inculpatory defendant and asked if he wanted to talk about that. Defendant responded, "Not really. No." The police did not cease interrogation at that point, but instead continued to describe co-defendant's incriminating statements and to question defendant. Defendant again voiced his desire to remain silent, eventually saying that he was not "gonna say nothing about nothing."

The questioning continued off and on for the next hour or so, until defendant eventually confessed. A few hours later, an assistant State's attorney interrogated defendant and obtained a videotaped confession.

3. Defendant's initial answer ("Not really. No.") was a clear and unequivocal statement that he did not want to waive his right to remain silent. It was not, as the State argued, limited to his desire to comment on his co-defendant's statements. Defendant thus unambiguously invoked his right to silence.

4. Any statements made after a defendant invokes his right to silence are admissible only if the authorities scrupulously honored his right to cut off questioning. To decide whether the authorities properly honored that right, courts ask whether: (1) they immediately halted the initial interrogation; (2) significant time elapsed between the interrogations; (3) they gave defendant new **Miranda** warnings; and (4) the second interrogation addressed a different crime.

5. Defendant's initial confession to the police should have been suppressed because they did not scrupulously honor his right to silence. The police did not immediately halt questioning, but instead continued to discuss his co-defendant's statements and ask defendant for his side of the story. No time elapsed between defendant's invocation and the continued questioning. The police did not give defendant new **Miranda** warnings. And they continued to question him about the same crime.

6. Defendant's statements to the ASA were also inadmissible and should have been suppressed. The ASA arrived and interrogated defendant approximately four hours after his initial confession and gave defendant new **Miranda** warnings. The

second and third parts of the test were thus satisfied. But the first and fourth parts of the test were not. The police did not immediately cease interrogation after defendant invoked his right to silence and the ASA questioned defendant about the same crime. The authorities thus did not scrupulously honor defendant's invocation of his right to silence.

The Appellate Court suppressed defendant's confessions, reversed his convictions, and remanded his case for a new trial.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

## COUNSEL

### §13-4(a)(2)

**People v. Holt**, 2014 IL 116989 (No. 116989, 11/20/14)

Where the record clearly showed that defendant was unfit to stand trial, defense counsel did not provide ineffective assistance by failing to oppose the State's request to find defendant unfit, even though defendant personally wanted counsel to oppose the State's request by arguing that she was fit.

Prior to trial, the State expressed doubt about defendant's fitness and requested a court-ordered fitness evaluation. Defense counsel had no objection. The evaluation concluded that defendant was not fit to stand trial. At a subsequent fitness hearing held before a jury, the State took the position that it would be unable to prove that defendant was fit. At the end of the hearing, the court granted defense counsel's motion for a directed verdict of unfitness.

On appeal, defendant argued that trial counsel was constitutionally obligated to argue for a finding of fitness in deference to defendant's wishes. The court rejected this argument, holding that no plausible interpretation of the right to counsel would require counsel to argue for an outcome that would violate due process by subjecting an unfit defendant to trial.

The court took issue with defendant's suggestion that counsel did not believe defendant was unfit since the State was the first party to raise the issue of defendant's fitness. Based on the substantial evidence of defendant's unfitness, the mere fact that the State made the request first "signifies nothing in our opinion." By contrast, the record strongly indicated that defense counsel shared the belief of the State and the court that defendant was unfit.

Defendant's position on appeal would require trial counsel to oppose the State no matter what position it took so long as an incompetent defendant so desired. The

court characterized this position “as simply absurd.” A defendant who is unfit to stand trial does not have the ability to knowingly or intelligently waive her right to have the court determine her fitness. Similarly, an unfit defendant does not have the capacity to direct her counsel to do so either.

The first duty of a criminal defense attorney should be to assess whether the defendant is fit to stand trial, irrespective of the State’s position. By doing so, and by taking appropriate actions upon that assessment, defense counsel affords his client competent representation.

The court emphasized that its holding was limited to situations where the evidence clearly showed that defendant was unfit to stand trial, but defendant contended she was fit. In these circumstances, defense counsel is not obligated to adopt defendant’s position and argue for a finding of fitness. “In fact, by doing so, defense counsel would be violating his duty to the client and suborning a violation of due process.”

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

#### **§13-5(d)(3)(a)(1)**

**People v. Porter**, 2014 IL App (1st) 123396 (No. 1-12-3396, 11/12/14)

1. When a defendant makes a *pro se* post-trial allegation of ineffective assistance of counsel, the trial court must conduct an adequate inquiry into the factual basis of the claim. If the court determines that the claim lacks merit or pertains solely to trial strategy, it need not appoint new counsel. By contrast, if the court finds possible neglect of the case, new counsel must be appointed. Where the trial court fails to conduct an inquiry into a *pro se* ineffective assistance claim, *de novo* review is applied.

In order to trigger the trial court’s duty to inquire about counsel’s representation, defendant must make more than a bald allegation that counsel was ineffective. In other words, the trial court is required to act only if the *pro se* defendant makes specific claims with supporting facts. The trial judge does not have a *sua sponte* duty to investigate merely because it learns that defendant has complained about counsel’s actions.

2. Here, defendant’s statements at sentencing did not trigger a duty on the part of the trial court to inquire as to ineffective assistance of counsel. Defendant made no overt claim of ineffective assistance, but continued to profess her innocence. The court concluded that to the extent defendant’s statements referred to counsel’s representation, those statements amounted to a disagreement over strategy and the nature of the State’s evidence rather than an allegation of incompetence.

Furthermore, the court concluded that defendant's statements were "rambling" and ambiguous. Statements which are susceptible to more than one interpretation do not trigger a duty on the part of the trial court to inquire about counsel's representation. **People v. Taylor**, 237 Ill.2d 68, 927 N.E.2d 1172 (2010).

Because defendant failed to bring a specific claim of ineffective assistance to the trial court's attention, the court was not required to conduct an inquiry concerning counsel's representation.

(Defendant was represented by Assistant Defender Jessica Ware, Chicago.)

## DOUBLE JEOPARDY

### §§17-2, 17-6

**People v. Guillen**, 2014 IL App (2d) 131216 (No. 2-13-1216, 11/25/14)

The trial court was in the process of accepting defendant's guilty plea and determining what sentence to impose (more or less at the same time), when the State decided that it had charged the wrong offense. The court allowed the State to *nolle pros* the current charges over defendant's objection.

When the State brought new charges, defendant moved to dismiss them on double jeopardy grounds, arguing before a new judge that the prior judge had implicitly accepted the guilty plea by discussing sentencing factors and thus jeopardy had attached. The new judge agreed and dismissed the charges.

The State appealed the trial court's dismissal. Defendant was not represented by counsel on appeal and filed no appellate brief responding to the State's arguments. The Appellate Court agreed that it could nonetheless consider the merits of the appeal, but split three ways on the rationale for doing so with no controlling opinion. The court decided 2-1 to reverse the trial court, again with no controlling opinion.

In **First Capitol Mortgage Corp. v. Talandis Construction Corp.**, 63 Ill. 2d 128 (1976), the Supreme Court set out three options available to the reviewing court when an appellee does not file a brief: (1) the court may, if justice requires, serve as an advocate for the appellee and search the record for reasons to affirm the judgment being appealed; (2) the court may decide the case on the merits if the record is simple and the issues easily decided even without an appellee's brief; or (3) the court may reverse the judgment below if the appellant's brief demonstrates *prima facie* reversible error and the record supports the appellant's contentions.

1. Justice Schostok delivered the judgment of the court reversing the trial court. Writing for herself alone, she selected the second **Talandis** option and determined that the trial court had improperly dismissed the charges on double jeopardy grounds.

Double jeopardy is violated by a second proceeding when the defendant was placed in jeopardy during the first proceeding and the first proceeding was improperly terminated. When the State *nol prosses* charges, a second prosecution is permitted if the *nol pros* occurred before jeopardy attached. If the *nol pros* occurs after jeopardy has attached, the *nol pros* generally acts as an acquittal that bars further prosecution.

In a guilty plea, jeopardy attaches when the court accepts the plea, but Illinois law has not clearly defined the point when a guilty plea has been accepted. In particular, the Illinois Supreme Court has not decided whether a trial court has accepted a plea when it has begun to accept the plea but then vacates the plea during the same hearing.

Substantial authority from other jurisdictions, however, suggests that a plea is accepted only when the trial court unconditionally accepts the plea. Thus, a trial court may vacate a guilty plea if it becomes aware of facts counseling against the plea, so long as the plea has not been accepted in a final and unconditional manner.

Based on these principles, Justice Schostok found that jeopardy had not attached when the State *nol prossed* the charges. Although defendant indicated that he wished to plead guilty, and the court admonished him about some of the consequences of his plea and began considering sentencing matters, other aspects of plea acceptance were not present here. The parties still had not agreed on the minimum punishment defendant faced and the State had not presented a factual basis. The plea hearing thus had not concluded when the State *nol prossed* the charges. Any acceptance of the plea was preliminary rather than unconditional.

Even if jeopardy had attached, the prosecution was not improperly terminated. During the plea hearing, both the State and the court realized that defendant had been improperly charged. The State's decision to *nol pros* the charges thus was not for an improper purpose and the court could properly terminate the plea proceedings, vacate the plea, and grant the State's motion without violating double jeopardy.

The trial court's dismissal of the charges was reversed.

2. Justice Zenoff agreed with the judgment reversing the trial court, but disagreed with Justice Schostok's use of the second **Talandis** option. Instead, Justice Zenoff selected the third **Talandis** option and determined that the appellant's brief showed *prima facie* reversible error.

The State argued that Supreme Court Rule 402 requires the trial court to comply certain formalities before accepting a plea. The record showed that the court did not comply with those formalities and thus the State argued that the trial had not

yet accepted defendant's plea. Justice Zenoff found that this argument made a *prima facie* showing that no double jeopardy violation occurred here. Under the third *Talandis* option, that was enough to reverse the trial court's dismissal.

3. Justice Hudson dissented from the judgment reversing the trial court. He selected the first **Talandis** option and, acting as an advocate for defendant, would have found that the trial court properly dismissed the charges on double jeopardy grounds. The record showed that the trial court was beginning to pronounce sentence and therefore had already accepted the guilty plea. Jeopardy had thus attached and the trial court properly dismissed the new charges on double jeopardy grounds.

#### **§17-4**

**People v. Clark**, 2014 IL App (1st) 123494 (No. 1-12-3494, 11/20/14)

The Illinois Constitution bars an appeal from a judgment of acquittal even where the court's ruling was based on a mistake of fact or law. Similarly, the double jeopardy clauses of the United States and Illinois Constitutions preclude retrial after an acquittal due to insufficient evidence, without regard to whether the court erred in evaluating the evidence or the decision flowed from an incorrect ruling of law. A judgement constitutes an acquittal where it actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

Here, defendant was charged with aggravated vehicular hijacking while armed with a firearm and armed robbery while armed with a firearm. At the close of trial, the judge stated that he found defendant "guilty of aggravated vehicular hijacking and armed robbery without a firearm." The basis of the ruling was that the defendant had been armed with a firearm but used the weapon only as a bludgeon.

The court concluded that the defendant was acquitted by the trial court's ruling. The court also noted that where there is a conflict between the oral pronouncement of a court and a written order, the oral pronouncement controls. Thus, defendant was acquitted by the judge's oral statement although the written sentencing order stated that defendant had been convicted of vehicular hijacking with a firearm and armed robbery with a firearm.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

## EVIDENCE

### §19-2(b)(1)

**People v. Jaimes**, 2014 IL App (2d) 121368 (No. 2-12-1368, 11/6/14)

1. Gang-related evidence need not be excluded where it is relevant to an issue in dispute and the probative value is not substantially outweighed by the prejudicial effect. The trial court's decision regarding the admission of gang-related evidence will not be disturbed unless there was an abuse of discretion.

2. Here, gang-related evidence was admissible because the State's theory was that the offense occurred as a result of an altercation between rival gangs. In addition, evidence that defendant identified himself as a member of a gang was admissible although the jury was informed that the admission was made to an employee at a juvenile detention facility and thus learned that defendant was involved in the juvenile justice system. The court noted that the employee did not testify to the reason defendant was being detained and that the evidence merely satisfied the requirement that the State establish a proper foundation for the testimony.

The court noted, however, that it was unnecessary for the State to introduce testimony by a second correctional officer concerning a separate admission by defendant that he was a gang member. Although the gang-related evidence introduced in this case was not excessive or unduly prejudicial, by presenting the duplicative testimony of a second witness the State came "close to crossing that forbidden threshold." The court stated that in the future, the State should be "more circumspect" in its use of such cumulative evidence.

Defendant's conviction for first degree murder and attempt first degree murder were affirmed.

### §19-23(a)

**People v. Thompson**, 2014 IL App (5th) 120079 (No. 5-12-0079, modified upon denial of rehearing 11/18/14)

1. A witness who did not personally observe the events in question may identify, as lay opinion testimony, a defendant depicted in a video or photograph so long as the witness was better able than the jury to make an identification. To determine whether such evidence is admissible courts must find that: (1) the witness was familiar with defendant prior to the offense; and (2) the testimony will aid the jury in resolving the issue of identification without invading the duties of the trier of fact. Testimony will properly aid the jury and not invade its duties where a defendant's appearance has changed between the time of recording and the date of trial, and/or the video or



photograph is unclear and the testimony will help describe or interpret the unclear depiction.

Here, four witnesses identified defendant as the person depicted in the surveillance video and still photograph derived from the video. Each witness was familiar with defendant prior to the offense. But there was no evidence defendant had changed his appearance prior to trial, and none of the witnesses had a better perspective than the jury to interpret the evidence.

Although the still photograph was blurry, none of the witnesses who identified defendant described any particular features or aspects of defendant that would have aided the jury in interpreting the unclear depiction. The jury was able to compare both the video (which presented a clear depiction) and the distilled image against defendant, who was present in court, and there is no basis for concluding that the witnesses could make a more informed assessment of who was depicted in the surveillance evidence. The introduction of this identification testimony was thus improper.

2. The identification testimony was also improper as police procedure evidence. The consequential steps in a police investigation are generally relevant to explain the State's case to a jury. The State must be allowed to explain why a previously unidentified defendant became a suspect. But here none of the identification testimony explained how defendant became a suspect since he had already been identified before any of the police witnesses viewed the surveillance video. The identification testimony thus did not assist the jury in understanding the steps of the investigation or how defendant became a suspect.

3. Even if this identification testimony had been admissible, the cumulative impact of calling four witnesses to each offer their opinion of who was depicted in the surveillance video would have run the risk of improperly supplanting the function of the jury. Even when admissible, trial judges should limit the amount of such evidence. Here, the four identifications "painted multiple layers of prejudice on the images presented to the jury."

Given the singular role of surveillance evidence, a conviction obtained following the introduction of cumulative identification testimony cannot be trusted. The cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Lawrence O'Neill, Mount Vernon.)

**§§19-24(a), 19-24(b)(1), 19-24(b)(2), 19-24(b)(3)**

**People v. Johnson**, 2014 IL App (2d) 121004 (No. 2-12-1004,11/17/14)

At a jury trial for first degree murder and aggravated criminal sexual assault, the trial court admitted evidence that defendant allegedly committed three other sexual assaults against three different persons. One of the separate offenses occurred 11 years before the charged offenses, and the other two occurred within a few months after the charged offenses. The trial court admitted the other crimes on the issues of propensity, intent, motive, lack of mistake, and *modus operandi*.

The Appellate Court agreed with defendant that the other crimes evidence was inadmissible for the asserted purposes, but found that it was properly admitted as propensity evidence.

1. Generally, evidence of other crimes is inadmissible to show propensity to commit a crime, but is admissible if relevant for any other purpose such as *modus operandi*, intent, motive, identity, or absence of mistake. Subsequent bad acts may be used as other crimes evidence.

725 ILCS 5/115-7.3(b) creates an exception to the general rule in certain sex offense prosecutions. Under §115-7.3(b), in a prosecution for one of the specified offenses the State may introduce evidence that defendant committed another of the specified offenses. Such evidence is admissible for any relevant purpose, including defendant's propensity to commit sex crimes.

Before evidence may be admitted under §115-7.3(b), the trial court must weigh the probative value of the evidence against the undue prejudice it might cause. The admissibility of the evidence rests within the discretion of the trial court, whose decision will not be disturbed absent an abuse of discretion.

2. Here, the trial court erred by admitting the other crimes for motive, lack of mistake, and *modus operandi*. Because defendant maintained that the sexual intercourse was consensual, neither *modus operandi* nor lack of mistake was at issue. Furthermore, there was nothing in the record to suggest that the other crimes created a motive to commit the instant offense, especially where two of the other crimes occurred after the charged crime and the other occurred several years earlier.

3. The court concluded, however, that the other crimes evidence was relevant to show defendant's intent and propensity to commit sex offenses, and was therefore properly admitted. The court rejected the State's argument that under **People v. Perez**, 2012 IL App (2d) 100865, evidence that is admitted pursuant to §115-7.3(b) is admitted without limitation concerning its use. The court concluded that because §115-7.3 authorizes the use of other crimes evidence only if relevant and where the probative value is not outweighed by the prejudicial effect, evidence is admissible only on matters that are relevant under the facts of the case.

The court also rejected defendant's argument that reversible error occurred when the jury was instructed that it could consider the other crimes evidence not only for propensity and intent but also for motive, lack of mistake, and *modus operandi*. First, the trial court was not required to give any limiting instruction. Second, precedent holds that where a limiting instruction permits a jury to consider other crimes evidence for a number of reasons, and one of those reasons is determined on appeal to be improper, the conviction must be affirmed despite the overly broad instruction.

Defendant's convictions for first degree murder and aggravated criminal sexual assault were affirmed.

(Defendant was represented by Supervisor Charles Hoffman, Chicago.)

## GUILTY PLEAS

### §§24-6(a), 24-8(a)

**People v. Perry**, 2014 IL App (1st) 112584 (No. 1-12-2584, 11/26/14)

1. Supreme Court Rule 605(c) requires the trial court to admonish a defendant who has entered a negotiated guilty plea that: (1) he has the right to appeal, (2) before taking an appeal he must file a written motion within 30 days asking to have the judgment vacated and for leave to withdraw the plea, (3) if the motion is allowed the plea and sentence will be vacated and a trial date set, (4) any charges that were dismissed as part of the plea agreement may be reinstated, (5) if defendant is indigent a copy of the transcript will be provided and counsel will be appointed to assist the defendant in preparing the motions, and (6) any issue not raised in the motion to withdraw the plea will be waived. The trial court need not use the exact language of Rule 605(c) so long as it conveys the substance of the rule.

Here, the trial court's admonishments were inadequate. First, the admonishments did not deal at all with two of the requirements of Rule 605(c) - informing defendant that if his plea was withdrawn dismissed charges could be reinstated and that issues not raised in the motion to withdraw the plea would be waived. Second, some of the remaining admonishments were unclear. For example, the trial court told defendant that he had 30 days to file an appeal rather than that he was required to file a motion to withdraw the plea, but also referred to what would happen if it granted or denied "the motion." Because the admonishments lacked the specificity necessary to resolve any ambiguity, they were insufficient to impart the information required under Rule 605(c).

2. Once a guilty plea defendant expresses an interest in challenging his plea, the trial court has an affirmative duty to ascertain whether the defendant desires counsel

to assist in preparing and presenting the postplea motions. Rule 604(d); **People v. Griffin**, 305 Ill. App. 3d 326, 713 N.E.2d 662 (2nd Dist. 1999). Where a guilty plea defendant who had not been properly admonished under Rule 605(c) filed several “notification of motions,” and when asked by the trial court if he wanted to withdraw his plea responded that he did because he had “ineffective assistance of counsel,” there was a sufficient indication of defendant’s desire to challenge his plea to trigger the court’s affirmative duty to offer the appointment of counsel.

## INDICTMENTS, INFORMATIONS, COMPLAINTS

### §29-4(a)

**People v. Whalum**, 2014 IL App (1st) 110959-B (No. 1-11-0959, mod. op. 11/10/14)

1. Section 111-3(c) of the Code of Criminal Procedure requires the prosecution to specifically state in the charging instrument its intention to seek an enhanced sentence based on a prior conviction. 725 ILCS 5/111-3(c). In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice to defendant under section 111-3(c) only applies when the prior conviction used to enhance the sentence is not an element of the offense.

2. Both **Easley** and the present case involved the offense of unlawful use of a weapon by a felon (UUWF). 720 ILCS 5/24-1.1(a). To prove UUWF the State must show that defendant possessed a weapon or ammunition and had a prior felony conviction. The sentence for UUWF is dictated by subsection (e) and depends on the nature of the prior felony. If the prior felony is UUWF or a number of other felonies listed in subsection (e) (including forcible felonies and a Class 2 or greater felony drug offense), then UUWF is a Class 2 felony; otherwise it is a Class 3 felony.

In **Easley** the charging instrument specifically listed UUWF as the prior felony that would be used to prove the prior conviction element of the offense. Here, by contrast, the prior felony was a drug conviction from Wisconsin. The Appellate Court held that this prior offense did not fall under any of the felonies listed in subsection (e) and therefore the prior conviction did not make defendant’s UUWF offense a Class 2 felony.

3. The court rejected the State’s argument that the Wisconsin conviction for delivery of a controlled substance was the equivalent of one of the drug-related offenses listed in subsection (e). The legislature did not set out a general description of a crime in subsection (e) that would have been comparable to crimes from other states. It instead listed several specific statutes defining Illinois offenses. By doing so, the legislature did not intend to include equivalent offenses from other states under subsection (e).

4. Because the State relied on another prior conviction (other than the prior Wisconsin drug conviction that was charged as an element of the offense) to enhance defendant's sentence to a Class 2 felony, **Easley** did not control the outcome of this case. Instead, the State was required to provide defendant with notice under section 11-3(c) that it intended to seek an enhanced sentence. Since it failed to do so, defendant's case was remanded for re-sentencing as a Class 3 felon.

(Defendant was represented by Assistant Defender Jeff Svehla, Chicago.)

### **§29-6**

**People v. Leavitt**, 2014 IL App (1st) 121323 (No. 1-12-1323, 11/21/14)

1. Under Illinois law, the statute of limitations is tolled when an indictment is returned or an information is filed. The Appellate Court concluded that where an indictment was returned within the three-year-statute of limitations, but was sealed because there was an ongoing investigation into police misconduct, no statute of limitations violation occurred when the indictment was unsealed after the statute of limitations had expired.

2. The court rejected arguments that due process and the constitutional right to a speedy trial were violated where the indictment was sealed for 12½ months, until after the statute of limitations had expired. The court concluded that the factors used to determine whether the constitutional right to a speedy trial has been violated also apply to the due process question. Those factors are: (1) the length of the delay, (2) defendant's assertion of his speedy trial right, (3) the reason for the delay, and (4) any prejudice to the defense.

Here, the delay was longer than one year and was therefore presumptively prejudicial. However, because defendant was unaware of the sealed indictment, his failure to assert his speedy trial right was not a factor.

The court found that the purpose for sealing the indictment - to permit law enforcement to complete a sensitive, ongoing investigation into wrongdoing in the Park Ridge Police Department - was clearly proper and served the interests of justice. Thus, the third factor favored a finding that there was no speedy trial or due process violation.

Concerning the final factor, the court held that the sealing did not cause prejudice. In assessing prejudice to the accused from a delay, courts consider three interests that are protected by the speedy-trial right: (1) prevention of oppressive pretrial incarceration, (2) minimization of anxiety and concern on the part of the accused, and (3) limiting the possibility that the defense will be impaired. Because

defendant was not incarcerated and was unaware that an indictment had been returned, only the third factor was relevant here.

Defendant did not claim that his defense to the charge had been prejudiced by the sealing of the indictment. However, he stated that he delayed changes in his personal and professional life until after he thought the statute of limitations had expired. The court concluded that because such changes were unrelated to defending against the charge, they did not create prejudice under the final factor.

The trial court's order dismissing the indictment on statute of limitation grounds was reversed.

## **INSANITY - MENTALLY ILL - INTOXICATION**

### **§30-1(a)**

**People v. Steele-Kumi**, 2014 IL App (1st) 133068 (No. 1-13-3068, 11/17/14)

A criminal defendant who is acquitted by reason of insanity and found by the trial court to be in need of mental health services on an inpatient basis is to be committed for a period not to exceed "the maximum length of time that the defendant would have been required to serve, less credit for good behavior . . . , before coming eligible for release had he been convicted of and received the maximum sentence for the most serious crime for which he has been acquitted by reason of insanity." 730 ILCS 5/5-2-4(b).

The court rejected the State's argument that where a defendant is acquitted by reason of insanity on multiple charges which would have carried mandatory consecutive sentences had the defendant been convicted, the maximum commitment period should be equal to the term that would be served on two consecutive sentences rather than the maximum sentence for the single most serious crime. The court concluded that the plain language of §5-2-4(b) specifies that the commitment period is based upon the maximum sentence for the single most serious crime, and that the legislature would have used different statutory language had it intended for the commitment period to be based on multiple offenses.

## JURY

### §32-4(c)(1)

**People v. Shaw**, 2014 IL App (4th) 121157 (No. 4-12-1157, 11/25/14)

1. Under **Batson v. Kentucky**, 476 U.S. 79 (1986), courts follow a three-step procedure to evaluate claims of discrimination in jury selection. During the first step, defendant must make a *prima facie* showing that the State used peremptory challenges on the basis of race. During the second step, the State must articulate race-neutral reasons for its challenges. If the State proffers race-neutral reasons, defendant may rebut the reasons as pretextual. During the third step, the court must determine whether defendant has shown purposeful discrimination in light of all the evidence.

In deciding whether defendant has made a *prima facie* showing, the court must consider the totality of the relevant facts and circumstances surrounding the peremptory challenge. The court should consider a number of factors, including a pattern of strikes against a racial group, a disproportionate use of strikes against a group, the racial composition of the venire as compared to the jury, and whether the excluded jurors were a heterogeneous group sharing race as their only common characteristic.

2. The State exercised peremptory challenges on two of the three African-American veniremembers. Defendant, who is African-American, objected to both challenges. As to the first veniremember, defendant argued that there were no facts or circumstances other than race that would explain the challenge. The trial court turned to the State for an explanation. The prosecutor responded that he did not think “this is the correct procedure,” since defendant had not established any pattern of strikes with regard to race. Nevertheless, the prosecutor gave a race-neutral explanation for the challenge.

Defendant argued that it would be impossible to show a pattern where there was only one African-American veniremember to strike. The trial court overruled the objection concluding that defendant had not “established a pattern under **Batson**.”

Defendant objected to the State’s second challenge on the basis that the State had used peremptory challenges against both African-American veniremembers, and thus “we now have a pattern.” Without seeking input from the State, the trial court stated that it did not find a pattern with either challenge.

3. The Appellate Court stated that it was unclear whether the trial court had found a *prima facie* case of discrimination. Although the trial court asked for and the State provided a race-neutral explanation for the first challenge, in its ruling the court failed to discuss any of the relevant factors other than the lack of a pattern. The trial court thus failed to proceed methodically through the three-step **Batson** procedure, and incorrectly collapsed the first and second steps into a single inquiry. The record also showed that the trial court improperly denied defendant’s challenge to the first

strike solely because he failed to establish a pattern of discrimination, which is only one of several factors relevant to a *prima facie* case.

As to the second challenge, the Appellate Court again held that the trial court failed to follow the clear three-step **Batson** process. It was thus impossible to conduct a meaningful review of defendant's arguments. The Appellate Court remanded the case for the trial court to conduct a full **Batson** hearing.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

### §32-6(a)

**People v. Hasselbring**, 2014 IL App (4th) 131128 (No. 4-13-1128, 11/24/14)

A judge is required to answer questions from the jury if clarification is requested, the original instructions are incomplete, the jurors are confused, or the question concerns "a point of law arising from facts over which doubt or confusion exists." But in answering the jury's questions, a judge may not misstate the law or infringe on the province of the jury. And a judge should not answer a question requiring a conclusion on the issues at trial, or express an opinion that would direct a verdict.

Here defendant was charged with aggravated driving with a drug, substance, or compound in his breath, blood, or urine. 625 ILCS 5/11-501(a)(6), (d)(1)(F). The trial evidence showed that defendant had Benzoyllecgonine, a cocaine metabolite but not itself a controlled substance, in his blood and urine. During deliberations, the jury sent a question to the court asking if "the cocaine metabolite" qualified as a substance. Over defendant's objection, the trial judge answered the question by stating that the cocaine metabolite qualified as a drug, substance, or intoxicating compound. Approximately 30 minutes later, the jury found defendant guilty.

The Appellate Court held that the judge's answer was improper. The ultimate issue here was whether defendant had a drug, substance, or compound in his blood or urine resulting from his use of cocaine. The jury only asked whether the metabolite was a substance, but the court went beyond the question and answered that it was also a drug and an intoxicating compound. This answer essentially directed a verdict for the State and resolved the ultimate issue for the jury. Additionally, since there was no evidence that the metabolite was an intoxicating compound, the answer conflicted with the evidence.

Defendant's conviction was reversed and remanded for a new trial.



## NARCOTICS

### §35-3(c)(1)

**People v. Jones**, 2014 IL App (3d) 121016 (No. 3-12-1016, 11/17/14)

Defendant was convicted of cannabis trafficking, 720 ILCS 550/5.1(a), an offense requiring the State to prove that defendant knowingly possessed the cannabis. Defendant argued on appeal that the State failed to prove he knew the FedEx package he possessed contained cannabis.

1. Knowledge can rarely be shown through direct proof and may instead be established by defendant's acts, declarations, or conduct supporting the inference that he knew about the cannabis. While a trier of fact may infer knowledge from suspicious behavior, mere possession of an unopened package containing cannabis is insufficient to prove knowledge.

Here, there were numerous suspicious circumstances that would have allowed a trier of fact to find that defendant knew about the cannabis in the FedEx package. Defendant picked up the package from his stepmother's house where it had been delivered. He then took possession of the package even though it did not have his name or address on it. He claimed it was wrongly delivered and left with the package to ostensibly return it to FedEx, but was not driving in the direction of the FedEx facility when he was stopped. Defendant also made a series of false statements about the package after he was arrested. Based on these factors, a rational trier of fact could easily infer that defendant knew the package contained cannabis.

2. The court rejected defendant's reliance on the First District's decision in **People v. Hodogbey**, 306 Ill. App. 3d 555 (1999) for the proposition that "suspicious behavior in the vicinity of narcotics will not suffice as proof of knowledge as to their presence." The court agreed with the Second District's decision in **People v. Brown**, 2012 IL App (2d) 110640, pointing out that the proposition stated in **Hodogbey** was actually based on a misreading of an Illinois Supreme Court case, **People v. Jackson**, 23 Ill. 2d 360 (1961), which stated the exact opposite, *i.e.*, that suspicious behavior *may* constitute proof of knowledge.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

## REASONABLE DOUBT

### §42-4

**People v. Jones**, 2014 IL App (3d) 121016 (No. 3-12-1016, 11/17/14)

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Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

## SENTENCING

### §§45-10(a), 45-10(e)

**People v. Whalum**, 2014 IL App (1st) 110959-B (No. 1-11-0959, mod. op. 11/10/14)

1. Section 111-3(c) of the Code of Criminal Procedure requires the prosecution to specifically state in the charging instrument its intention to seek an enhanced sentence based on a prior conviction. 725 ILCS 5/111-3(c). In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice to defendant under section 111-3(c) only applies when the prior conviction used to enhance the sentence is not an element of the offense.

2. Both **Easley** and the present case involved the offense of unlawful use of a weapon by a felon (UUWF). 720 ILCS 5/24-1.1(a). To prove UUWF the State must show that defendant possessed a weapon or ammunition and had a prior felony conviction. The sentence for UUWF is dictated by subsection (e) and depends on the nature of the prior felony. If the prior felony is UUWF or a number of other felonies listed in subsection (e) (including forcible felonies and a Class 2 or greater felony drug offense), then UUWF is a Class 2 felony; otherwise it is a Class 3 felony.

In **Easley** the charging instrument specifically listed UUWF as the prior felony that would be used to prove the prior conviction element of the offense. Here, by contrast, the prior felony was a drug conviction from Wisconsin. The Appellate Court held that this prior offense did not fall under any of the felonies listed in subsection (e) and therefore the prior conviction did not make defendant's UUWF offense a Class 2 felony.

3. The court rejected the State's argument that the Wisconsin conviction for delivery of a controlled substance was the equivalent of one of the drug-related offenses listed in subsection (e). The legislature did not set out a general description of a crime in subsection (e) that would have been comparable to crimes from other states. It instead listed several specific statutes defining Illinois offenses. By doing so, the legislature did not intend to include equivalent offenses from other states under subsection (e).

4. Because the State relied on another prior conviction (other than the prior Wisconsin drug conviction that was charged as an element of the offense) to enhance defendant's sentence to a Class 2 felony, **Easley** did not control the outcome of this case. Instead, the State was required to provide defendant with notice under section 11-3(c) that it intended to seek an enhanced sentence. Since it failed to do so, defendant's case was remanded for re-sentencing as a Class 3 felon.

(Defendant was represented by Assistant Defender Jeff Svehla, Chicago.)

## VERDICTS

### §§55-3(a), 55-3(c)

**People v. Clark**, 2014 IL App (1st) 123494 (No. 1-12-3494, 11/20/14)

1. A defendant has a due process right to notice of the charges brought against him. A defendant may be convicted of an uncharged offense only if that crime is a lesser included offense of a crime with which the defendant is expressly charged. The charging instrument approach is used to determine whether an uncharged crime is a lesser-included offense.

Under this approach, the court looks first to the allegations of the charging instrument to see whether the description of the greater offense contains the broad foundation or main outline of the lesser offense. Every element of the lesser offense need not be explicitly contained in the greater charge, so long as the missing elements can be reasonably inferred. If the description of the greater offense contains the broad foundation of the lesser offense, the defendant may be convicted of the lesser offense if the evidence presented at trial rationally supports a conviction on that offense.

720 ILCS 5/18-4(a) provides alternative methods of committing aggravated vehicular hijacking: (1) by taking a motor vehicle from the person or immediate presence of another by the use or threat of immediate force while armed “with a dangerous weapon, other than a firearm,” (720 ILCS 5/18-4(a)(3)), or (2) by taking a motor vehicle from the person or immediate presence of another by the use or threat of immediate force while armed “with a firearm.” (720 ILCS 5/18-4(a)(4)). Similarly, armed robbery is defined as: (1) knowingly taking property other than a vehicle from the person or the presence of another by the use or threat of imminent force while armed with “a dangerous weapon, other than a firearm” (720 ILCS 5/18-2(a)(1)), or (2) knowingly taking property other than a vehicle from the person or the presence of another by the use or threat of imminent force while armed with “a firearm.” (720 ILCS 5/18-2(a)(1)). Thus, the statutes create mutually exclusive forms of armed robbery and aggravated vehicular hijacking depending on the nature of the weapon used.

Because the offenses are mutually exclusive, charging one offense does not allege the basic outlines of the alternative offenses. In other words, the allegation that defendant was armed with a firearm necessarily excluded an allegation that he was armed with a dangerous weapon other than a firearm. Furthermore, none of the language in the charging instrument implies that defendant was armed with a weapon other than a firearm or that he used a firearm as a bludgeon. Therefore, aggravated vehicular hijacking with a dangerous weapon other than a firearm and armed robbery with a dangerous weapon other than a firearm were not lesser included offenses of aggravated vehicular hijacking with a firearm and armed robbery with a firearm.

2. The court concluded that entering judgment on offenses that were not lesser-included offenses of charged offenses constitutes plain error under the second prong of

the plain error rule, which applies to clear and obvious errors which are so serious as to affect the reliability of the trial and challenge the integrity of the judicial process.

The convictions were reduced to vehicular hijacking and robbery and the cause was remanded for re-sentencing.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

## **WAIVER - PLAIN ERROR - HARMLESS ERROR**

### **§§56-1(b)(1)(b), 56-1(b)(2), 56-1(b)(7)(a)**

**People v. Denson**, 2014 IL 116231 (No. 116231, 11/20/14)

1. In criminal cases, an issue is preserved for review if it is raised in either a motion *in limine* or a contemporaneous trial objection and is included in the post-trial motion. Where the State filed a motion *in limine* to admit co-conspirator statements as an exception to the hearsay rule, defendant filed a response, and the trial court granted the motion *in limine* after a full hearing, the issue was preserved although defendant did not file his own motion *in limine*. The court stressed that the forfeiture rule is intended to encourage defendants to raise issues in the trial court, ensure that the trial court has an opportunity to correct any errors before the case is appealed, and prevent defendant from obtaining a reversal through his or her own inaction. In light of these purposes, the critical consideration is not which party initiated the motion *in limine*, but whether the issue was in fact litigated in the trial court:

Under these circumstances, requiring defendant to recaption and refile his response to the State's motion as a motion *in limine* of his own would accomplish precisely nothing, other than to clutter the record with duplicative pleadings. Because the trial court was given a full and fair opportunity to rule upon the issue through the State's motion *in limine* and the defendant's response, the issue was preserved when defendant placed it in his post-trial motion, without any need to file his own motion *in limine*.

2. Furthermore, where statements were admitted after the State's motion *in limine* was granted, defendant was not required to offer a contemporaneous objection when the evidence was presented at trial. Instead, defendant preserved the issue by filing a response to the motion *in limine* and placing the issue in the post-trial motion.

The court acknowledged that in civil cases, a contemporaneous trial objection is required to preserve an issue that has been litigated in a motion *in limine*. In criminal cases, by contrast, the issue must be included in the post-trial motion but

need not be the subject of a contemporaneous objection at trial. The court explained the difference in procedure by noting that a post-trial motion is required in all criminal cases but may or may not be required in civil cases.

The court also criticized the State for taking inconsistent positions in the trial court and on appeal. In the lower court, the State indicated that its purpose in filing the motion *in limine* was to avoid having the defense raise an objection at trial that would require the trial to be interrupted. “Given this, we have some difficulty now entertaining the State’s argument that defendant forfeited review of the contested statements by failing to make a contemporaneous trial objection, when insulating those statements from a contemporaneous trial objection was the State’s express objective. . . .” and implicit request.” The court added, “[W]e in no way can condone the State’s maneuvering in this case, and we strongly discourage the State from proceeding this way in the future.”

(Defendant was represented by Assistant Defender Chris McCoy, Elgin.)

**§§56-2(a), 56-2(b)(6)(a)**

**People v. Clark**, 2014 IL App (1st) 123494 (No. 1-12-3494, 11/20/14)

The court concluded that convicting a defendant on charges which were not lesser-included offenses of charged crimes constitutes plain error under the second prong of the plain error rule, which applies to clear and obvious errors which are so serious as to affect the reliability of the trial and challenge the integrity of the judicial process. The court rejected the State’s argument that the second prong of the plain error rule applies only to a limited class of errors identified as "structural error" by the United States Supreme Court, including the complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. The court concluded that the Illinois Supreme Court did not intend to so limit second prong plain error.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)